

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

WES W. JOHNSON,

Plaintiff,

v.

HOMEcomings FINANCIAL, et al.,

Defendant.

Case No.: 09cv1262 L (NLS)

**ORDER GRANTING IN PART AND  
DENYING IN PART PLAINTIFF'S  
MOTION TO VACATE [ECF No. 87]**

**Background**

On September 20, 2011, the Court granted defendants' motion to dismiss the first amended complaint. The following claims were dismissed with prejudice: violation of NRS 598D.100; wrongful foreclosure; quiet title; violations of the FCRA, FDCPA and TILA; and unjust enrichment. Plaintiff's fraud claims, breach of the duty of good faith and fair dealing and breach of contract claims were dismissed without prejudice. Plaintiff was given leave for file a second amended complaint. The SAC was timely filed on October 3, 2011. On October 18, 2011, plaintiff filed a motion for reconsideration of the Court's Order concerning dismissal of claims from the FAC. On October 20, 2011, defendants filed a motion to dismiss the SAC. On October 31, 2011, plaintiff filed an amended motion for reconsideration. [ECF No. 47]

The Court denied, on the merits, plaintiff's amended motion for reconsideration on

1 April 9, 2012. [ECF No. 54] On April 19, 2012, the Court granted defendant's motion to  
2 dismiss the SAC [ECF No. 55] and judgment was entered that same day.

3 Plaintiff attempted to file a motion for reconsideration of the Court's April 19,  
4 2012 Order on May 17, 2012, but the document was rejected by a discrepancy order  
5 because plaintiff had not obtained a hearing date prior to the filing of his motion. [ECF  
6 No. 58] On May 21, 2012, plaintiff filed both a motion for reconsideration and a notice of  
7 appeal to the Ninth Circuit Court of Appeal. [ECF Nos. 59, 60]

8 On May 31, 2012, defendants Homecomings Financial, GMAC Mortgage, LLC  
9 and Executive Trusts Services filed a Notice of Bankruptcy. [ECF No. 63] Thereafter, the  
10 Court noted that the Bankruptcy action automatically stayed the action as to the  
11 defendants in bankruptcy. However, the Court required the defendants not in bankruptcy  
12 to meet and confer with plaintiff's counsel to determine whether the action should go  
13 forward as to the remaining defendants or whether the entire action should be stayed  
14 during the pendency of the bankruptcy proceedings, and to provide a status report the  
15 Court concerning their intended plans for the litigation. [ECF No. 64] The parties  
16 requested that the entire action be stayed which the Court granted. The Court, however,  
17 also required periodic reports during the stay to determine the status of the bankruptcy  
18 proceedings.

19 In one of the later status reports, the parties indicated that a resolution of the case  
20 might be forthcoming. As a result and for administrative purposes only, the Court denied  
21 without prejudice plaintiff's May 21, 2012 motion for reconsideration, and noted that if a  
22 settlement was not reached after the conclusion of the bankruptcy proceedings, plaintiff  
23 could again file his motion for reconsideration. [ECF No. 74]

24 On July 9, 2015, the Court entered an order to show cause why the action should  
25 not be dismissed based on plaintiff's failure to advise the Court of the bankruptcy  
26 proceedings or to litigate the case within the past 18 months. [ECF No. 81] On July 20,  
27 2015, plaintiff responded to the OSC indicating that the approval of the Chapter 11 plan  
28 had been accomplished in December 2013, but offered no explanation for counsel's

1 failure to prosecute the action or advise the Court of the conclusion of the bankruptcy  
2 proceedings. Although noting that dismissal would be appropriate given plaintiff's failure  
3 to prosecute the action diligently, the Court did not dismiss the action. Instead, the Court  
4 lifted the stay.

5 Plaintiff now moves to vacate the discrepancy order, vacate the order denying  
6 without prejudice plaintiff's motion for reconsideration, permit the filing of an amended  
7 motion for reconsideration, and set a briefing schedule on the amended motion for  
8 reconsideration.

### 9 Discussion

10 Plaintiff urges that the Court to vacate its discrepancy order rejecting the motion  
11 for reconsideration, and its order denying without prejudice plaintiff's motion for  
12 reconsideration based on the requirement that such a motion must be made within 28  
13 days following entry of judgment. According to plaintiff, even though the motion for  
14 reconsideration was denied on procedural grounds, the refiling of the motion at this point  
15 would be untimely.

16 First, when a motion is rejected for procedural deficiencies, the refiling of the  
17 document is deemed filed nunc pro tunc to the date the rejected document was filed.  
18 Thus, plaintiff's refiled motion for reconsideration electronically filed May 21, 2012, is  
19 deemed timely filed on May 18, 2012, and there is no basis to vacate the discrepancy  
20 order.

21 Turning to the motion for reconsideration, the Court denied, for administrative  
22 purposes only, the motion. The Court expressly noted that plaintiff could reurge his  
23 motion for reconsideration if the matter did not settle. It has not. Accordingly, the Court  
24 need not vacate the Order denying the motion for reconsideration but instead, deems the  
25 previously timely filed motion for reconsideration reopened.

26 Because of the significant lapse in time as a result of the bankruptcy stay and  
27 plaintiff's inaction in this case, plaintiff seeks to amend his motion for reconsideration to  
28 update the legal authority cited. This request is reasonable, as is plaintiff's request for a

1 briefing schedule on an amended motion for reconsideration.


2 **Conclusion**

3 Based on the foregoing, plaintiff's motion to vacate and for other relief is  
4 **GRANTED IN PART** and **DENIED IN PART** as follows:

- 5 1. Plaintiff's motion that the discrepancy order filed May 18, 2012, and the motion  
6 denying the motion for reconsideration for administrative purposes be vacated  
7 is **DENIED**;
- 8 2. Plaintiff's refiled motion for reconsideration, deemed timely filed on May 18,  
9 2012, is **REOPENED**;
- 10 3. Plaintiff may file on or before December 18, 2015, an amended motion for  
11 reconsideration to update legal arguments and citations. The amended motion  
12 for reconsideration will relate back to the initial May 18, 2012 filing date, and  
13 will be deemed timely filed for purposes of Federal Rules of Civil Procedure 59  
14 and 60;
- 15 4. Defendants shall file a response to the amended motion for reconsideration on  
16 or before January 4, 2016; Plaintiff may file a reply memorandum on or before  
17 January 11, 2016. The amended motion will be considered without oral  
18 argument after January 19, 2016.

19 **IT IS SO ORDERED.**

20 Dated: December 11, 2015

21   
22 Hon. M. James Lorenz  
23 United States District Judge  
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